

2. Why the market can't ensure a free press

COMMENTARY

When Australia's Independent Media Inquiry headed by ex-judge Ray Finkelstein released its report on the Australian media in February 2012, if you had been following the media discussion since then, one could not be blamed for thinking that Finkelstein wanted to create a state super cop which would seize control of the media, impose new standards on journalists, dragging every blogger and tweeter into its net. Some media have accused the inquiry report of being 'leftist', academic and beyond the comprehension of ordinary people. Part of the media's job is to explain to the public what is in reports they do not have time to read so they can decide what they think. This commentary was an attempt to do that published by the independent *New Matilda* online magazine.

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THE Independent Media Inquiry report began by setting out some core principles. A free press is crucial and no regulation should be allowed to threaten its independence or censor it. The media and journalists have rights which they exercise on behalf of the public to whom they should be accountable.

The report also accepts that media exercises power and can do harm. When harm is done, citizens need remedies. These are the core principles on which the report is based.

In considering how to find ways to put these principles into place, the report sets out key arguments about the role of the press in democracy. Contemporary political philosophy has moved beyond simply seeing government as the only threat to media freedom. Many argue you also need to consider the power of media itself, especially the power of big media companies.

The inquiry looks at other theories, including those which concentrate on the media's role in providing a voice for citizens and a forum for political discussion. Rather than favouring any single rationale for free speech, it concludes:

This is the situation this Inquiry must address: how to accommodate the increasing and legitimate demand for press accountability but to do so in a way that does not increase state power or inhibit the vigorous democratic role the press should play or undermine key rationales for free speech and a free press. (Finkelstein, 2012, p. 53)

Finkelstein finds that you cannot rely on the market to deliver a free press. This is particularly true in Australia with its highly concentrated media. The inquiry was discouraged by its terms of reference, which did not mention issues of ownership, from looking at broader solutions to the structure of the media. Nevertheless, it found that an examination of ways of delivering quality journalism and ethical standards cannot avoid considering the concentrated nature of the media. It provides a useful update of ownership issues.

Australia has the most concentrated media in the developed world. News Limited has 65 percent of total circulation of metropolitan and national daily newspapers—Fairfax controls another 25 percent (and is also the largest owner of newspapers in New Zealand). In a study of 26 countries, Australia was the only one in which a single company—News Corporation—accounts for more than half of daily circulation. In 20 of the countries surveyed the share of the top company was under 40 percent. With a share of 86 percent, Australia's top two companies—News Corp and Fairfax Media—hold a greater share than in any of the other countries.

The Australian newspaper market is not the sort of competitive market which imposes discipline on suppliers of products. It is a highly concentrated market in which 'consumers have little choice and little power to influence what is supplied'. In fact, newspapers operate in a dual market serving both readers and advertisers with only about a quarter of their income coming from circulation sales.

In seeking to best serve the commercial interests of shareholders, newspaper managers regularly balance conflicting needs of readers and advertisers. 'It is unlikely', the report finds, that 'the resolution of these conflicts will

always favour the interests of readers'. This point is an important one which highlights the flaws in the argument, regularly trotted out by those opposed to strengthening accountability, that the rights of consumers lie in their ability not to consume media products.

Finkelstein argues that before considering what steps to take to ensure accountability, you need to establish that there are problems which need fixing. After acknowledging the high quality journalism that is regularly published, he proceeds to spell out serious problems with Australian media.

There is, as he calls it, a case of 'market failure'. The media and reasons for its existence can never be reduced to the needs of producers and consumers which is why we have codes of ethics to protect broader public interest. He then returns to the problem of concentration which in some cities and towns means that there is a possibility that media owners and journalists will unduly influence public opinion.

The second problem is high levels of distrust of the media demonstrated through lots of surveys.

The third problem is harm actually done by the media. The ex-chair of the Australian Press Council, Professor Ken McKinnon, told the inquiry of examples where media used its power to oppose policy on self-interested commercial grounds and unfairly pursue individuals on the basis of inaccurate information. The inquiry referred to other examples of ethical breaches and to the Australian Centre for Independent Journalism (ACIJ) and *Crikey.com* investigation into the influence of PR on news media and studies by Robert Manne and the ACIJ on how News Limited was extremely 'biased' in its coverage of the significant issue of climate change.

The inquiry concluded that the costs of harm are borne not by the media or their consumers but the community. Therefore steps are needed to reduce the harms.

What is wrong with the current regulatory system?

Contrary to what you might think from reading the media, our current system already includes both statutory and self-regulation. The broadcast media have what is called a 'co-regulation' model. The commercial broadcasters set their own standards and have 60 days to answer any complaint.

If the complainant is not satisfied with the response, he or she can then move on to the Australian Media and Communications Authority which will

take four months to consider the complaint. The complainant is not even a party to these proceedings and is usually not even interviewed. The inquiry found that this system does not sufficiently recognise the rights of complainants and needs an overhaul. This finding alone shows that the inquiry does not favour all forms of statutory regulation which can be just as dysfunctional as self-regulation.

The inquiry also considered the performance of the Australian Press Council (APC) which is funded by big media companies with nearly half coming from News Limited and a quarter from Fairfax Media. (This section of the report sets out the history of how the owners undermined the effectiveness of the APC at crucial moments, including when News Limited took over the Herald and Weekly Times Limited in 1987).

Former APC chairperson McKinnon told the inquiry that the owners do not give the Council the independence it needs and that he supported bolstering the Council's security with extra public funding. The current chair, Julian Disney, also argued for some public support and argued that more power is needed to make decisions enforceable. (The point that the council itself has been concerned about enforcement powers if complaints are upheld has been missed by most media.)

The big companies, in particular the CEO of Fairfax, Greg Hywood, disagreed with current chair Professor Julian Disney and argued that the Press Council is adequately funded and should be restricted to running a complaints process. Hywood and others argued the council does not need to research the media, as it did for a short period in its *State of the Media* report which was defunded in 2009. The companies' lack of support for the current chairman's position undermined Disney's attempt to argue the merits of change based on the council.

This led the inquiry to conclude that the APC 'suffers from serious structural constraints . It does not have necessary powers or funds to carry out function'. It found that the APC lacks independence which leaves media accountability to the whim of companies who say they are satisfied with what even the Press Council itself argues is a deficient system.

By arguing that nothing needed to be done, the owners effectively stymied an argument for reform and more independent self-regulation which the inquiry acknowledges might be preferable.

Is public funding a threat to independence?

The inquiry considered whether public funding of a media regulatory body, as the owners argue, is necessarily a threat to independence. As Finkelstein points out: If public funding is a threat, then why isn't private funding a threat? He referred to evidence before the Inquiry, including from an APC chairperson Professor Ken McKinnon that any concern about lack of independence of regulation flowing from the source of its funding should also apply to the private publishing companies who currently fund the APC (p. 180).

Accordingly, he asks 'whether the potential negative impact of government funding on the performance of the APC's functions would be greater or lesser than the existing system' (p. 183). He also pointed out that the newspapers already receive government subsidy in the form of advertising, which they do not see as a threat to their editorial independence.

Having concluded that the current system is so flawed as to prevent piecemeal reform and that public funding is not a threat, Finkelstein moves to his key recommendation which is for a single council across all media called the News Media Council. The move to a cross media form of regulation recognises the impracticality of dealing with print and broadcast separately when online media publish text, video and sound.

News Media Council

The APC currently appoints its own members which the inquiry found is not sufficiently independent. Instead Finkelstein suggests that an 'independent' body including several academics, the Solicitor General and Commonwealth Ombudsman appoint an independent publicly-funded News Media Council which would consist of a chairperson and 20 part-time members, half men and half women. One half would have no connection with the media. The media and the Media, Entertainment and Arts Alliance (MEAA) union would be consulted in the selection of others.

The council would set standards 'in consultations with industry' which would probably be similar to those already in place in journalists' codes of ethics.

The aim would be to provide a speedier complaints service than currently exists. This service would not prevent media from making their own corrections, giving rights of reply and so on in the normal course of their business. If media, such as ABC, SBS and *The Sydney Morning Herald*, have an internal

process, complaints would initially be referred to those organisations. The emphasis would be on resolving complaints. If a hearing was required, documents could be required but confidentiality of journalists' sources would be respected. If a finding was made against the media, an order could be made for an apology, a correction or a right of reply. This order would be enforceable, eventually through a court. There would be no fines or compensation.

Again and again in the report, Finkelstein stresses the importance of independence. The only role of the government should be a funding one as the proposal is not about 'increasing the power of government or about imposing some form of censorship. It's about making the news media more accountable to those covered in the news and to the public generally'. Funding needs would be assessed by the council on a three-year basis, and verified by the Commonwealth Auditor-General in order to guarantee independence which is lacking if the funding arrangements for the Press Council.

The new body would not just deal with complaints but would research and report on the state of the media, including trends in the provision of quality and investigative journalism. There is no other body which currently has these tasks. The News Media Council could take up issues it believed important even if there was no complaint. It would have a role in educating the media and the public.

Who would be covered by the News Media Council?

The council would cover only organisations that 'gather, analyse and disseminate news'—but who this includes, it acknowledges is 'not easy to define'. It suggests that those publications which have more than 3000 readers or 15,000 hits a year should be included. (There has been much criticism of this suggestion as the estimates seem low and the potential cost to small independent operators such as *New Matilda* and others could be high).¹

Should there be an enforceable right of the reply?

This is where the balance between freedom and accountability gets tricky. The inquiry considered whether enforcing a 'right of reply' in circumstances where harm has been found to be done is a threat to free speech or could have a 'chilling effect' on the media.

An enforced 'right of reply' does diminish free speech but a 'right of reply' without enforceability is not a right at all. It concludes that the threat to free

speech of forcing a right of reply needs to be balanced against the harm done by not granting a right of reply. One answer to those who argue that a right of reply interferes with independence is to publish more on an issue rather than denying others a right of reply.

The inquiry rejects the idea that communities should have a ‘right of access’ to the media because even if it was theoretically possible, it would be impractical and impose an unreasonable financial cost on the media.

Is there a need for public subsidy of the media?

Is there a need for public subsidy of the media to ensure availability of quality and investigative journalism? Some submissions argued that public subsidies are needed to support quality and investigative journalism, as occurs in Norway and some other countries. The media owners argue this is not necessary in Australia. The inquiry did not find that subsidies should be immediately implemented but did acknowledge that the media situation is changing rapidly.

The News Media Council would chart trends to see if there is a serious decline in production and delivery of quality journalism and in two years, it recommends a thorough analysis of industry by the Productivity Commission. If the Productivity Commission finds gaps, the ABC could be given more funding which would be tied to particular ventures.

The inquiry finds public subsidy for journalism, beyond funding of public broadcasters, does not necessarily threaten its independence and lays out some possibilities. There is some support for a public subsidy for university-based investigative journalism which is being promoted by some journalism academics—including those at the ACIJ where I am based. The possibilities of introducing tax deductions for investigative journalism is also accepted.

A final significant finding is that Finkelstein recommends urgent action to address increasingly poor news media services in regional communities through public funding.

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Professor Bacon has continued to follow the debate. Additional commentary on both the Finkelstein reports can be found on her blog www.wendybacon.com ² wendybacon@gmail.com

Notes

1. Those assisting the inquiry were aware that the demarcation figure should not be too low. One of these people, Professor Rod Tiffen, has since admitted to the author that the figure cited is too low and has led to confusion about who is intended to be regulated by the News Media Council.
2. Further Wendy Bacon reports: Effective media accountability does not have to threaten journalists independence: www.wendybacon.com/2012/effective-media-accountability-does-not-have-to-threaten-journalists-independence/
Role for government in protecting independent media?: www.wendybacon.com/media/page/2/

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